NO. 50427-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

TERENCE FRANKLIN HOPWOOD,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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2. As a constitutional issue raised for the first time on appeal the appellant was provided late discovery during the trial and the subjects of that discovery should have been excluded or a continuance should have been given.
3. As a constitutional issue raised for the first time on appeal the appellant was denied the right of confrontation of the witnesses against him when hearsay statements of interrogation of Williams and texts of Williams and Bosco were admitted.
4. As a constitutional issue raised for the first time on appeal appellant received ineffective assistance of counsel in that counsel was aware of no probable cause for arrest and failed to raise the issue, allowed a physical exhibit containing unadmitted material to go to the jury for deliberations and failed to ask for relief as to late discovery.
5. As a constitutional issue raised for the first time on appeal the

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. ILLEGAL ARREST AND SEIZURE.

This is a constitutional error not raised at trial and is AE 1. AE 21, 23 and 25 are exhibits which should have been excluded had the issue been raised as they stemmed from the appellant's arrest

2. LATE DISCOVERY VIOLATES FAIR TRIAL RIGHTS.

This is a constitutional issue not raised at trial which is AE 2. The court should either have continued the trial or have disallowed the testimony wherein discovery wasn't granted, AE 20.

3. IMPROPER AUTHENTICATION OF TEXTS.

Appellant's Motion In Limine was improperly denied thus allowing

into evidence, and the State's opening argument, improperly authenticated texts, AE 7, 16, 18, 21, 23 and 25. This also deprived appellant of the right to cross examine the persons who sent the texts.

4. APPELLANT DENIED THE RIGHT OF CONFRONTATION.

This was a constitutional error not raised at trial, AE 3. As pointed out above this also applies to AE 16, 18, 21, 23, and 25. Appellant had the right to examine the maker of these statements both textual and oral.

5. INEFFECTIVE ASSISTANCE OF COUNSEL.

This was a constitutional error not raised at trial, AE 4. Trial counsel participated in extensive examination of the details of appellant's arrest yet never raised the issue of its legality and allowed appellant's oral statements to be entered into evidence, AE 6. Counsel also never asked for relief from late discovery and allowed a cell phone with large unknown data to be given to the jurors when such data was never admitted into evidence.

6. RIGHT TO PRESENT DEFENSE EVIDENCE.

The appellant tried to put into evidence a complete statement exonerating him by the alleged victim which the court refused to allow while allowing the state to present other parts of the alleged victim's statement, AE 22.

7. DOUBLE JEOPARDY.

This is a constitutional issue raised for the first time. A jury was

seated and evidence was heard so that the appellant was in jeopardy when the state dismissed the count charging appellant with unlawful possession of a firearm. The state then moved to amend the information charging appellant with a lesser firearm charge, which had the same elements, thus putting appellant in jeopardy a second time, AE 5.

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9. INSUFFICIENT EVIDENCE ON COUNT I.

The state presented no direct evidence as to whether the alleged victim was a minor but contended that it could be inferred from the alleged facts that the police report made the bland assumption she was, that she had been listed as a runaway and that the police booked her into juvenile, AE 28.

10. UNADMITTED EXHIBITS DURING JURY DELIBERATION.

The court allowed a cell phone containing unknown evidence which had not been admitted as evidence to be sent back, with other exhibits, to the jury during deliberations, AE 21.

C. STATEMENT OF THE CASE.

The police were conducting a "sting" operation in hopes of arresting for prostitution a woman (hereinafter Williams) who had advertised in a

"Backpage" ad. Williams set up a meeting with a police officer at the parking lot of a Tacoma McDonald's restaurant. Williams arrived in a Hummer driven by the appellant and went to a local hotel with the detective.

(VR 432, 442-445, 498-452, 454, 458-459)

The appellant sat at a table in the parking lot and other officers blocked the Hummer from leaving and approached appellant. Numerous officers participated in this. They detained appellant, questioned him, then took him to the police station and seized his Hummer. The appellant at first denied and then admitted to possessing a firearm, which was seized along with his cell phone. A warrant was obtained to search the Hummer and items were seized from it. Statements were obtained from the appellant before and after giving him Miranda warnings. The statements, the firearm, the cell phone and texts and photos from it were admitted at trial.

At the time of appellant's detention and the above mentioned seizures the officers had no information other than that the suspected prostitute had arrived in appellant's Hummer. (VR 108-149, 463, 771)

At the hotel Williams offered and agreed to commit acts of prostitution and was arrested. Although no proof of her age was obtained she was suspected of being a juvenile and was booked into a juvenile facility. The fact of this booking was the proof offered at trial that she was a minor in support of the charge brought against appellant of commercial sexual abuse

of a minor. The court ruled that an element could be found by "inference". (VR 305-309, 677, 1084-1088)

Williams did not testify at trial. Statements made by her that appellant was not her pimp but that other men were, along with statements that appellant had just given her a ride were suppressed by the court.

Numerous texts on appellant's and Williams' phones were introduced at trial and were never authenticated as to who made or read the texts. Among the texts were exchanges from the appellant's phone (unidentified as to whether the appellant sent them other than that they were on his phone) with a person named Bosco who wished to purchase a prostitute. No evidence was offered to show that the prostitute Bosco wished to purchase was Williams who was arrested herein.

The jury convicted appellant on both amended counts.

D. ARGUMENT

1. ILLEGAL ARREST AND SEIZURE.

(Assignments of Error, hereinafter AE, 1, 21, 23, 25)

If appellant was illegally arrested, then the statement taken from him, the phone with contents, the auto with contents and the firearm can't be admitted or testified about at trial. Count II regarding the firearm would have to be dismissed and there would be insufficient evidence to support Count I regarding engaging in the commercial sexual abuse of a minor. The court

found that appellant was "in custody" from the time the officers first approached him. (CP 189, VR 171)

Under Washington law, the police may not detain a citizen unless there is a "'substantial possibility that criminal conduct has occurred or is about to occur.'" State v. Mendez, 137 Wn.2d 208, 223 (1999) (emphasis added) (quoting State v. Kennedy, 107 Wn.2d 1, 6 (1986)); see also State v. Walker, 66 Wn. App. 622, 626 (1992). "[C]ircumstances must be more consistent with criminal than innocent conduct." State v. Mercer, 45 Wn. App. 769, 774 (1986). Moreover, the test is an objective one. Because there is no "good faith" exception to the exclusionary rule in Washington, the subjective beliefs of the officer are irrelevant. State v. White, 97 Wn.2d 92 (1982); State v. Sanchez, 74 Wn. App. 763 (1994); State v. Trenidad, 23 Wn. App. 418 (1979).

In order to meet the Terry standard, an officer's suspicion must be individualized. State v. Parker, 139 Wn.2d 486, 497-98 (1999); State v. Richardson, 64 Wn. App. 693, 697 (1992); State v. Thompson, 93 Wn.2d 838, 841 (1980). A generalized suspicion based purely on an individual's presence in a particular area cannot justify a Terry stop. Sibron v. New York, 392 U.S. 40, 62, 88 S. Ct. 1912, 20 L. Ed. 2d 917 (1968).

Similarly, the fact that an individual is in the company of others suspected of crime does not establish the necessary reasonable articulable suspicion. State v. Lennon, 94 Wn. App. 573, 580 (1999). "Merely associating

with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution." State v. Broadnax, 98 Wn.2d 289, 296 (1982); See also Thompson, 93 Wn.2d at 841 ("mere proximity to others independently suspected of criminal activity does not justify [a] stop."). In Sibron v. New York, a companion case to Terry, the Supreme Court stated in no uncertain terms that:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

Sibron, 392 U.S. at 62.

The police in the instant case detained appellant and blocked in his automobile. At no time at the scene did they have any information other than that the suspected prostitute had arrived in appellant's automobile. They then questioned him, handcuffed him and transported him to the police station, seizing a firearm from him, and seized his auto. This is clearly an illegal arrest.

2. LATE DISCOVERY VIOLATES FAIR TRIAL RIGHTS.

(AE 2 and 20)

CrR 8.3(b) permits the dismissal of a case for prosecutorial misconduct. Specifically, the rule reads:

> The court, in the furtherance of justice after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set

forth its reasons in a written order.

The Washington State Supreme Court interpreted CrR 8.3(b) in State v. Michielli, 132 Wn.2d 229, 243, 937 P.2d 587 (1997), ruling that "governmental mismanagement satisfies the 'misconduct' element [of 8.3(b)]."

In Michielli, the state's action forced the defense to proceed unprepared. The court found that this action by the state prejudiced the defendant and satisfied the misconduct element of 8.3(b). Id. at 245. Specifically the court held that "Defendant was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial." Id. at 244. Finally the Court opined that "Defendant's being forced to waive his speedy trial right is not a trivial event. . . . The State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." Id. at 245. The court affirmed the trial court's dismissal of the case with prejudice pursuant to 8.3(b). Id. at 246.

CrR 4.7(a) provides the following:

> Prosecuting Authority's Obligations.
>
> (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting authority shall, upon written demand, disclose to the defendant the

following material and information within his or her possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting authority intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

. . .

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects which the prosecuting authority intends to use in the hearing or trial or which were obtained from or belonged to the defendant; …

(2) The prosecuting attorney shall disclose to the defendant:

…

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(inapplicable sections omitted)

This obligation stems from CrR 4.7(a) and the defendant's request for discovery, in addition to simple due process and notice concerns.

In the instant case there were numerous instances where discovery was presented for the first time during the course of the trial. Since the appellant was already in jeopardy at that time the State should not have been permitted to proceed with the use of any of the evidence which was produced

at that late date. The charges involving the use of this improper evidence should be dismissed.

3. IMPROPER AUTHENTICATION OF TEXTS.

(AE 7, 16, 18, 21, 23 and 25)

Numerous texts of Williams, the appellant and an unidentified person named "Bosco" were admitted, depriving appellant of a fair trial.

ER 901 requires that an item be authenticated before it is admitted into evidence. In Courtroom Handbook on Washington Evidence, Karl Tegland, Thomson Reuters, 2017-2018 Edition (hereinafter Tegland) it is stated at p. 467, "The rule requires only that the witness have personal knowledge that the document or other exhibit is authentic."

None of the texts at issue were authenticated by a witness with personal knowledge (ER 901(b)(1)). The authentication involved surmises by the content of the text itself. There is a substantial difference between the purported texts to and from appellant and Williams and the texts involving Bosco (hereinafter, the Bosco texts).

The Bosco texts, while on the appellant's cell phone, were between Bosco (who was never identified by any testimony or other evidence) and an unidentified person. It can only be speculated as to the "ho" discussed by Bosco and the unidentified person, and no evidence was presented to show it involved Williams. There is nothing in the context of the texts relating

specifically to either the appellant or Williams. They are obviously prejudicial under ER 403.

As to all of the texts they are identified only by the opinion of the state's witnesses with no personal knowledge, in violation of ER 701. At p. 322, Tegland says, "A lay opinion is admissible under Rule 701 only if it is 'rationally based upon the perception of the witness.' This provision makes it clear that the requirement of firsthand knowledge under Rule 602 applies even though the witness is allowed to testify in the form of an opinion."

The fact that a text appears on a person's phone or computer isn't dispositive. Commonwealth v. Purdy, 459 Mass. 442, 945 N.E.2d 372 (2011), at p. 381, states,

> Evidence that the defendant's name is written as the author of an e-mail or social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been sent by the defendant.

ER 901(b) and State v. Young, 192 Wn. App. 850, 369 P.3d 205 (Div. II, 2016), give additional non-exclusive methods of authenticating an email/text. Quoting ER 901(b)(10), Young, 192 Wn. App. at 855-56, states:

> Testimony by a person with knowledge that (i) the email purports to be authored or created by the particular sender or the sender's agent; (ii) the e-mail purports to be sent from an e-mail address associated with the particular sender or the sender's agent; and (iii) the appearance, contents substance, internal patterns, or other distinctive characteristics of the e-mail, taken in conjunction with the circumstances, are sufficient to support a finding that the e-mail in question is

what the proponent claims.

Of the Bosco texts the only method is that it appears on Appellant's cell phone. As to texts on Williams' and appellant's phones the only methods are that they are on the respective phones and testimony showing the location of the phones when the texts were sent. The phone location is just that and doesn't authenticate the sender or receiver.

United States v. Vayner, 769 F.3d 125, 130 (2d Cir. 2014), points out, "The simplest (and likely most common) form of authentication is through 'the testimony of a witness with knowledge' that 'a matter is what it is claimed to be.'" (quoting United States v. Rommy, 506 F.3d 108, 138 (2d Cir. 2007)).

Vayner goes on to say, "Or, where the evidence in question is a recorded call, we have said that '[w]hile a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which need not fall into any set pattern, may provide the necessary foundation.'" Vayner, 769 F.3d at 130 (quoting United States v. Dhinsa, 243 F.3d 635, 658-59 (2d Cir. 2001)).

The contested document in Vayner was a printout of what was purported to be the appellant's profile page from a social-networking website. The court in Vayner concluded that because there was no evidence the appellant had created the profile page or was responsible for its contents, the

evidence had not properly been authenticated before being admitted. Vayner at 132. The court reversed the conviction.

In the instant case it might be further pointed out that the State made no attempt to find out from Backpage who had placed this ad. This outcome should prevail in this case.

4. APPELLANT WAS DENIED THE RIGHT OF CONFRONTATION.

(AE 3 and 16)

In the instant case none of the oral statements or texts were made in response to police questions about an ongoing emergency. Thus they were all testimonial in nature.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) states,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

State v. Goodwin, 29 Wn.2d 276, 286, 186 P.2d 935 (1947) states,

> The authorities seem to be quite uniform in holding, in cases of this character, that prior threats and statements, as well as subsequent admissions and statements, made by one co-defendant, are not admissible against the other, upon a separate trial, and that such statements are regarded as hearsay as much as if they had been made by a stranger.

In Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the court found that the appellant was denied the right of confrontation. The court explained:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural, rather than a substantive, guarantee.

In the instant case, the state urged the court that there was no confrontation problem as the witnesses were unavailable and that Ms. Williams was a co-conspirator.

The court found that Williams was not a co-conspirator (CP 201). Crawford, supra, stated that the only exceptions are unavailability coupled with a prior opportunity to cross examine. Such was not the case here, as appellant never had an opportunity to cross examine.

The state knew Williams's whereabouts in Oregon and could have sought a material witness warrant but didn't do so . CrR 4.10(a)(3) permits the issuance of a material witness warrant when it's impractical to secure the presence of the witness by subpoena. They merely mailed subpoenas to her.

Tegland, at p. 443, states,

> The declarant, however, is not considered unavailable unless the proponent has taken all reasonable steps to secure the presence of the declarant at trial, and those steps have failed.
>
> The fact that the declarant cannot be reached by subpoena, or has refused to respond to a subpoena, is insufficient to establish the declarant's unavailability. The rule requires an inability to reach the declarant by process "or other reasonable means." (citation omitted)

The state made no such showing. At CP 199 the court found, "The State took no legal action to secure the presence of an out of state Witness." The court found that Williams's statements to the police were reliable as statements against interest (CP 197). The state never sought a material witness warrant; if it had, Williams could have been taken into custody in Oregon and brought to the trial.

The fact that Williams admitted to the police that she was a prostitute is irrelevant to admitting other statements. State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000) adopts the test in Williamson, below.

Williamson v. United States, 512 U.S. 594, 600, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994) states:

> Nothing in the text of Rule 804(b)(3) or the general theory of the hearsay Rules suggests that admissibility should turn on whether a statement is collateral to a self-inculpatory statement. The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest should be treated any differently from other hearsay statements that are generally excluded.

5. INEFFECTIVE ASSISTANCE OF COUNSEL.

(AE 4 and 6)

Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), states, "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to provide just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."

What this means is pointed out in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) at pp. 225-26,

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

In the instant case the state continued to produce evidence during the course of the trial which had never been produced in discovery. While trial counsel objected, he never sought a remedy beyond exclusion. While the evidence should have been excluded, counsel could have asked for a

continuance. The prejudice is obvious, as there is no chance to do further investigation, formulate intelligent cross examination or produce witnesses to counter the surprise evidence.

Counsel failed to object to a cell phone containing evidence not admitted in evidence to go back to the jury with other admitted exhibits during their deliberations. This is discussed in greater detail below.

Further, with the extensive testimony describing appellant's arrest, counsel should have raised the issue of illegal arrest. The prejudice has been gone into in the above discussion on illegal arrest.

6. RIGHT TO PRESENT DEFENSE EVIDENCE.

(AE 22)

The court allowed a portion of a statement by Williams into evidence but denied appellant's right to put into evidence the remainder of the statement. In the excluded portion Williams denies that the appellant is her pimp while specifically naming two other men who she says were her pimps.

Following the Rule of Completeness, ER 106 states, "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

Williams admitting that she is a prostitute with pimps is a statement

against her interest, which shows reliability. The trial court had also already found the statement to be reliable, see above. Excluding the remainder of Williams's statement prejudices appellant in that Williams's entire statement raises a doubt as to whether the appellant, other than third parties, was guilty of the crime charged in the information.

Appellant has an absolute right to present in evidence a theory of defense that some other person committed the charged crime. Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). Taken as a whole, Williams's entire statement was evidence that a person other than appellant committed the crime of commercial sexual abuse of a minor. The court suppressed evidence that would establish this.

In State v. Anderson, 107 Wn.2d 745, 750, 733 P.2d 517 (1987), the Washington Supreme Court recognized that although admissions against interest made by a non-testifying codefendant are a hearsay exception, such statements must also bear adequate indicia of reliability sufficient to satisfy the Sixth Amendment right of confrontation.

The law on this issue was clearly articulated in Chambers v. Mississipi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973):

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence

> designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact, is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness, and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. at 302 (emphasis added; citations omitted).

Certainly a statement by a prostitute naming two other persons as her pimps and denying that appellant was her pimp has the potential of raising a reasonable doubt. The court's error in excluding the statement was not harmless. Gilmore v. Henderson, 825 F.2d 663, 665 (2d Cir. 1987) states, "'[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967)).

The potential testimony that the crime was committed by other persons supports appellant's attempt at trial to have Williams's complete statement put into evidence.

7. DOUBLE JEOPARDY.

(AE 5)

Appellant was originally charged with Unlawful Possession of a Firearm (hereinafter UPF) First Degree and pleaded not guilty. On February 14, 2017 an amended information charging UPF First Degree was filed, and the appellant pleaded not guilty (VR 157). The jury was sworn in on February 16, 2017 (CP 151). On February 21, 2017 the court dismissed the count charging UPF First Degree (CP 193 and VR 305). On that same day a second amended information charging UPF Second Degree was filed, to which Appellant pleaded not guilty (CP 53-54).

WPIC 133.02 (UPF First Degree) and WPIC 133.02.02 (UPF Second Degree) show that the two degrees of UPF contain the same elements. Hence, the jury being sworn, when UPF first degree was dismissed bringing another charge with the same elements amounts to double jeopardy.

The Fifth Amendment of the United States Constitution and the common law principle of double jeopardy preclude any person from being twice put in jeopardy for the same offense. Jeopardy attaches the moment a jury is sworn. United States v. Gaytan, 115 F.3d 737, 742 (9th Cir. 1997). The presentation of evidence to the jury began February 21, 2017 (VR 316).

Defendants have a right to be tried by the first jury empaneled. United States v. Bates, 917 F.2d 388, 392 (9th Cir. 1990). Subjecting a defendant to

a second prosecution, even though the first was not completed, may be grossly unfair. Arizona v. Washington, 434 U.S. 497, 503-05, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

Although a defendant may be retried following a mistrial, either the defendant must consent to the mistrial or it must be justified by "manifest necessity." Gaytan, 115 F.3d at 742. The protections of the double jeopardy clause assure that a defendant is entitled "to retain primary control over the course to be followed" when judicial or prosecutorial errors have occurred. Bates, 917 F.2d at 393.

The double jeopardy bar is implicated when two crimes for which the defendant is tried cannot pass the "same-elements" test. United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). "The same-elements test, sometimes referred to as the 'Blockburger' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." Dixon, 509 U.S. at 696 (citing Blockburger v. United States, 284 U.S. 299 (1932)).

This was adopted by State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Appellant is prejudiced by having a felony conviction and having it count as an "other current offense," which increases his offender score. This

gives him a higher guideline range even though the sentence on Count II runs concurrently. (CP 170, CP 174)

8. PASSION AND PREJUDICE.

(AE 17,18)

In State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), the court said, "The Court of Appeals … recognized that '(m)ere appeals to jury passion and prejudice, as well as prejudicial allusion to matters outside the evidence, are inappropriate.'"

In the instant case At VR 382-383 the court allowed, over objection, the questioning of a detective regarding the urgency of their actions. VR 382-83. As reasons for urgency, the detective listed "Juvenile. Backpage, runaway, from out of state, all—I mean, huge red flags which made it a priority to recover this girl that was so far away from home." VR 383.

The state elicited the following testimony:

> Q. What affect does it have on your operation that this is not only a juvenile, but an out-of-state juvenile who is a runaway and who's on Backpage?
>
> A. I don't know that it affects me in any way, but it makes it a priority type of situation to where it's something to where we want to attempt to contact her immediately and get her off of the streets and out of danger and see if indeed she's being exploited by someone.

VR 383.

This is obviously not relevant to the charges against appellant but

merely appeals to jury passion and prejudice that this is a very important thing and that the police must make a special effort in this case. Thus putting more emphasis on what a terrible crime the appellant is accused of committing. It suggests to the jury that they need to make special efforts to protect Ms. Williams.

This is obviously an appeal to the jury to support the police in their efforts to help this alleged victim. (VR 1202)

9. INSUFFICIENT EVIDENCE ON COUNT I.

(AE 28)

The only evidence as to whether Williams was a minor, an element of Count I, was based on three things: the police report stating so without providing a foundation for knowledge, the statement that Williams was a runaway, and the fact that Williams was booked as a juvenile (VR 678).

The police report is hearsay, to be excluded under ER 802, and no source is provided for the alleged birth date. Tegland, at p. 305, states, "A lack of foundation, for example, may be asserted if it has not been shown that the witness has personal knowledge of the facts required by Rule 602…"

The fact that Williams was a runaway or booked into a juvenile detention facility (VR 678) only proves that fact, not that she was under 18 years old. That conclusion is a non sequitur. Mistakes are often made when a person is booked.

Thus there is no proof of the element of being a minor in the Court's Instruction No. 13 (CP 127), which should require the dismissal of Count I. Additionally it should be pointed out that the Court's Instruction No. 9, defining "advances commercial sexual abuse of a minor", fails to state that the defendant must knowingly do so (CP 123). The court also ruled that this element could be found by inference.

10. UNADMITTED EXHIBITS DURING JURY DELIBERATION.

(AE 21)

A cell phone containing unknown data was given to the jury to take with them during deliberations (VR 506). "[I]t is reversible error for a trial court to allow physical objects not admitted in evidence to go the jury room." State v. Boggs, 33 Wn.2d 921, 933, 207 P.2d 743 (1949) (overruled on other grounds by State v. Parr, 93 Wn.2d 95, 606 P.2d 263 (1980)).

Anyone who has ever scrolled through an iPhone or computer knows that you will have "run ons" even if you know exactly where the saved data is (which isn't a given), which is even more probable if you have twelve people playing with the phone. It makes no difference if you tell those twelve people, "Erase from your mind the pink elephant you may come across." This is inherently prejudicial.

State v. Keodara, 191 Wn. App. 305, 364 P.3d 777 (Div. I, 2015) dealing with a search warrant for material in a cell phone, is analogous. The

court expressed its concern that "the warrant language also allowed Keodara's phone to be searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever." Keodara, 191 Wn. App. at 316. The court went on to say:

> The State argued that the warrant was sufficiently limited to search only for information related to specific crimes, such as evidence of possession with intent to sell drugs or possession of firearms or assault in the fourth degree. However, this is not sufficient under State v. Higgins, 136 Wn. App. 87, 92, 147 P.3d 649 (2006). In that case, we rejected the general description of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021." Id. The court found that a general reference to evidence of domestic violence was not sufficiently particular because the statute contained six different ways to commit the crime. Id. at 93. A warrant to search for evidence of any such violation would allow for seizure of items for which the State had no probable cause. Id.

Keodara at 316-17.

A jury with a cell phone would have to search the cell phone to find the data that was admitted as relevant evidence with the obvious danger that one or more of the jurors would encounter evidence that had not been admitted. An instruction that they should only retain that evidence that was admitted leaves the jury with having seen improper evidence and with deciding, on their own, which evidence the court had reference to in the court's instruction. This demands reversal.

E. CONCLUSION

For the reasons stated above the conviction should be reversed and the charges dismissed.

Respectfully submitted February 2, 2018

/s/ Phil Mahoney
Phil Mahoney, WSBA# 1292
Attorney for Appellant

DECLARATION OF SERVICE

Phil Mahoney declares, subject to the penalties of perjury of the State of Washington, as follows:

That he mailed a copy of this document to the Pierce County Prosecutor, 930 Tacoma Ave. S. # 946, Tacoma, WA 98402-2102 and to Terence Hopwood, #710825, R-6 Cell E1U, WCA, P.O. Box 900, Shelton WA 98584 on today's date.

February 2, 2018 at Seattle, Washington.

/s/ Phil Mahoney
Phil Mahoney, WSBA# 1292
Attorney for Appellant

February 02, 2018 - 5:43 PM

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